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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BRIAN KEITH BARNETT,  
  
Petitioner,  
  
v.  
  
SCOTT KERNAN, Secretary,  
  
Respondent.

Case No.: 17cv209-AJB (BLM)

**(1) REPORT AND RECOMMENDATION  
FOR ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS;**

**(2) ORDER DENYING PETITIONER'S  
REQUEST FOR AN EVIDENTIARY  
HEARING;**

**AND**

**(3) ORDER DENYING PETITIONER'S  
REQUEST FOR JUDICIAL NOTICE**

**[ECF Nos. 1, 28]**

This Report and Recommendation is submitted to United States District Court Judge Anthony J. Battaglia pursuant to 28 U.S.C. § 636(b) and Civil Local Rules 72.1(d) and HC.2 of the United States District Court for the Southern District of California. On February 1, 2017, Petitioner Brian Keith Barnett, a state prisoner who is proceeding *pro se* and *in forma pauperis*, commenced these habeas corpus proceedings pursuant to 28 U.S.C. § 2254. ECF No. 1 ("Pet.").

1 Petitioner challenges his conviction for assault with a deadly weapon. *Id.* at 2; see also ECF No.  
2 8-1 (“Answer”) at 12.

3 This Court has considered the Petition, Answer, Traverse [ECF No. 12 (“Traverse”)],  
4 Supplemental Traverse [ECF No. 22 (“Supp. Traverse”)], and all supporting documents filed by  
5 the parties. For the reasons set forth below, this Court **RECOMMENDS** that Petitioner’s Petition  
6 for Writ of Habeas Corpus be **DENIED**.

7 **FACTUAL AND PROCEDURAL BACKGROUND**

8 The following facts are taken from the California Court of Appeal’s April 29, 2016, opinion  
9 in People v. Barnett, Appeal No. D065324:

10 *Prosecution Evidence*

11 On the night of June 21, 2013, [Petitioner] and Frederick Morao had a loud  
12 argument at a residential hotel in San Diego. The two men were friends and  
13 [Petitioner] was temporarily staying with Morao. Morao had purchased  
14 methamphetamine from [Petitioner], and both had consumed “a lot” of “crystal  
15 meth” that day. The men argued about money [Petitioner] claimed Morao owed  
16 him for the methamphetamine.

17 Earlier in the day, Morao had witnessed Barnett hit Devon Clements (a  
18 friend of Morao’s), with sufficient force to knock him down. During the argument,  
19 Morao told [Petitioner] “I ain’t Devon. You ain’t going to hit me like Devon.” One  
20 of the two men said something like “We’ll handle this,” or “[I]et’s hit the corner”  
21 and Morao walked away from the hotel. [Petitioner] followed behind. Morao  
22 carried the bottom part of a pool cue (approximately two feet long and two inches  
23 in diameter) concealed inside his sweater. He had it with him because he knew  
24 [Petitioner] carried weapons, including a serrated knife with a four-to-five-inch  
25 blade. When [Petitioner] got close to Morao, Morao turned around, thinking  
26 [Petitioner] was going to “swing, hit me some kind” and “swung too,” swinging  
27 the pool cue at [Petitioner]. [Petitioner] was able to disarm Morao of the pool cue  
28 before being struck. Morao then began throwing punches at [Petitioner], many of  
which landed.

1           Clements followed slowly behind the men and saw [Petitioner] holding a  
2 cylindrical object about a foot and a half long during the fight. Clements initially  
3 stated he did not see [Petitioner] use the object on Morao, but later testified it did  
4 make contact with Morao. Clements originally described the object as looking like  
5 a rolling pin and testified it was wider than the pool cue. Morao felt blows to his  
6 chest and stomach during the fight. The brief fight stopped when Morao felt like  
7 he "got enough hits in," and Morao and [Petitioner] separated. [Petitioner] walked  
8 away limping and yelling something. Morao joined Clements and said something  
9 like "I got him." The two men gave each other "daps," a celebratory gesture.  
10 Morao and Clements then walked back toward the hotel and Morao realized he  
11 was bleeding heavily. After Morao reached the lobby, the hotel security guard  
12 called an ambulance. Morao lost consciousness after the paramedics arrived and  
13 the next thing he remembered is waking up after surgery. Morao remained in the  
14 hospital for a week.

15           Morao had multiple stab wounds, at least one to the left side of his stomach  
16 and one on his back. A doctor told Morao there were 14 stab wounds. Clements  
17 also recalled hearing from a police officer that Morao was stabbed 14 to 16 times  
18 and might not make it. In addition, the investigating officer, Detective Tews,  
19 recalled hearing from police officers at the scene that Morao was stabbed 14 times,  
20 but was unable to personally verify the number.

21           Detective Tews interviewed Morao. Morao initially told Detective Tews he  
22 had been jumped by two Hispanic men. Morao had prior felony convictions  
23 including theft, possession of methamphetamine for sale, petty theft with a prior,  
24 and robbery. He used his "felon mentality" when first speaking with the police.  
25 After learning about surveillance video of the incident, Morao told Detective Tews  
26 the truth about what happened, explaining he made up the initial story because  
27 he did not want to be a rat.

28           Detective Tews also interviewed [Petitioner]. [Petitioner] denied stabbing  
Morao. [Petitioner] told Detective Tews Morao tried to hit him with a pool cue, he  
took the cue away, Morao ran and was then attacked from behind by a "Hispanic  
dude." [Petitioner] admitted he always carried a knife and he had a black, foot-  
long, serrated knife with him at the time of the incident, but denied using the knife  
on Morao.

1           On June 21, 2013, Morao was either 5'3" or 5'7" and weighed around 205  
2 or 210 pounds. [Petitioner] is significantly taller than Morao. Morao felt  
3 threatened by the size disparity due to [Petitioner's] advantage of height and  
4 "reach." Morao was very soft spoken and nervous during [Petitioner's] cross-  
5 examination. Morao does not like weapons, does not know anything about knives,  
6 and does not need a knife. However, [Petitioner] had promised to get Morao a  
7 knife.

8           *Section 1118 Motion for Acquittal*

9           At the close of the prosecution's case, [Petitioner] moved for acquittal under  
10 section 1118. He argued there was insufficient evidence to show he used a knife.  
11 He further argued evidence showed Morao had a concealed pool cue, which he  
12 attempted to strike [Petitioner] with, [Petitioner] took the cue away from him and  
13 Morao swung and hit [Petitioner] 20 times. [Petitioner] asserted he "had an  
14 absolute right to defend himself" under those circumstances. The trial court  
15 denied the motion, noting although evidence established Morao (the smaller  
16 individual) initially had a pool cue, any force Morao used after being disarmed "did  
17 not justify the deadly force that [Petitioner] used when he stabbed him in the gut."  
18 The court therefore ruled there was sufficient evidence for a reasonable jury to  
19 find [Petitioner] guilty.

20           *Defense Evidence*

21           [Petitioner] represented himself. [Petitioner] first called Dr. Murphy, a  
22 forensic psychologist, who testified about the fight or flight syndrome and similar  
23 responses of people using crystal methamphetamine. [Petitioner] also called San  
24 Diego Police Officer Carlos Munoz (Officer Munoz), who had written a report of the  
25 incident stating Morao was stabbed 14 times. Hospital staff had informed Officer  
26 Munoz of the 14 stab wounds, but the specific source was not identified in his  
27 report and he could not recall who it was. Officer Munoz did not take pictures of  
28 any of the stab wounds.

          [Petitioner] took the stand. He described his relationship with Morao as  
one in which Morao depended upon him to "help him out" by supplying crystal  
methamphetamine and testified he would come from various locations in Southern

1 California, at his own expense, to supply Morao. The fight with Morao occurred  
2 because Morao was angry that [Petitioner's] friends would not give him a cheap  
3 price on illegal drugs. When Morao said "Let's go handle it," [Petitioner]  
4 anticipated a fistfight and believed he "ain't got no problem," as he was "fixing to  
5 whip this little chump's ass, you know, for crossing me up, plain and simple."  
6 [Petitioner] was not worried about fighting the younger Morao, a "guy in his  
7 prime," because "[m]ost youngsters these days, they don't even know how to sling  
8 the fist. They can't even fight. You know, I [was] brought up using my hands to  
9 defend myself."

10 [Petitioner] was attacked by Morao and "just defended [him]self." After  
11 [Petitioner] took the pool stick away from Morao, Morao ran and [Petitioner] did  
12 not pursue him. At the time, [Petitioner] saw Clements was following behind, and  
13 thought he was going to try to help Morao, but was not worried about being  
14 "double team[ed]" by the men. [Petitioner] had a gun in one of his back pockets  
15 during the incident, but had no intention of using it. [Petitioner's] "big ol' knife"  
16 was in his other back pocket. [Petitioner] was "hit in the nose" by Morao, and  
17 there was some bleeding.

18 [Petitioner] testified he used only his fists on Morao and did not stab him.  
19 Instead, Morao was stabbed by a Hispanic male after [Petitioner] disarmed him  
20 and Morao ran off into the street. After [Petitioner] took Morao's weapon away,  
21 Morao "turned around and he got stabbed."

22 Lodgment 8 at 2-7 (internal footnotes omitted).<sup>1</sup>

23 Following the trial, the jury found Petitioner guilty of assault with a deadly weapon. Id.  
24 at 2; Lodgment 3 at 168. The jury also found true that Petitioner personally inflicted great bodily  
25 injury upon Morao and personally used a dangerous or deadly weapon within the meaning of

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26 <sup>1</sup> This Court presumes the state court's factual determinations to be correct absent clear and  
27 convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); Miller-El v. Cockrell, 537 U.S. 322,  
28 340 (2003); see also Parke v. Raley, 506 U.S. 20, 35 (1992) (holding findings of historical fact,  
including inferences properly drawn from such facts, are entitled to statutory presumption of  
correctness).

1 California Penal Code sections 12022.7(a) and 1192.7(c)(23). Lodgments 8 at 2; 3 at 168. On  
2 January 29, 2014, the trial court sentenced Petitioner to seventeen years in state prison.  
3 Lodgment 1-12 at 1883.

4 On December 5, 2014, Petitioner appealed his conviction, arguing that the trial court  
5 committed reversible error by: (1) denying his motion for acquittal under section 1118.1 because  
6 there was insufficient evidence to find Petitioner did not act in self-defense, and (2) prejudicially  
7 instructing the jury regarding self-defense after an attacker is disabled or danger ceases  
8 (CALCRIM No. 3474). Lodgment 5. On April 29, 2016, the California Court of Appeal affirmed  
9 Petitioner's conviction. Lodgment 8. On June 3, 2016, the date of Petitioner's petition for review  
10 in the California Supreme Court, Petitioner reasserted the same claims raised in his appeal.  
11 Lodgment 9. On July 27, 2016, the California Supreme Court denied the petition for review  
12 without a statement of reasoning or citation to authority. Lodgment 10.

13 On January 29, 2014, the date Petitioner was sentenced, Petitioner filed a Petition for  
14 Writ of Habeas Corpus in the California Court of Appeal arguing that (1) his Faretta rights to due  
15 process and equal protection were violated when the county jail made decisional and statutory  
16 law available via a "kiosk" separate from the desktop with a word processor and denied him  
17 access to confidential legal phone calls and black ink pens, and (2) the thumb drive and media  
18 disc provided by the prosecution did not function, he could not contact the court clerk to calendar  
19 a hearing or obtain sufficient copies of documents for service, and the prosecutor had denied  
20 receiving his motions. Lodgment 11. On January 31, 2014, the California Court of Appeal denied  
21 the Petition as untimely, explaining that Petitioner "should have brought his complaints to the  
22 attention of the trial court before – not after – he proceeded to trial and was convicted" and  
23 that if Petitioner continued experiencing problems in filing and serving post-trial pleadings, he  
24 "should seek the trial court's assistance." Lodgment 12.

25 On May 9, 2016, Petitioner filed a second Petition for Writ of Habeas Corpus in the  
26 California Court of Appeal, arguing that: (1) the prosecutor knowingly and intentionally withheld  
27 exculpatory evidence, or alternatively, destroyed it before trial and (2) the prosecutor knowingly  
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1 elicited and permitted the introduction of false testimony that the exculpatory evidence  
2 referenced in ground one does not exist. Lodgment 13. On May 17, 2016, the California Court  
3 of Appeal denied the petition, noting that Petitioner demonstrated neither the materiality of the  
4 alleged undisclosed information nor that the police or prosecution were acting in bad faith.  
5 Lodgment 14.

6 On August 18, 2014, Petitioner filed a Petition for Writ of Habeas Corpus in the California  
7 Supreme Court, arguing that the California Court of Appeal erred in finding that Petitioner did  
8 not raise his allegations of Faretta rights violations to the trial court's attention. Lodgment 15.  
9 On October 15, 2014, the California Supreme Court denied the petition without a statement of  
10 reasoning or citation to authority. Lodgment 16.

11 On September 1, 2016, Petitioner filed a second Petition for Writ of Habeas Corpus in the  
12 California Supreme Court, arguing that: (1) the prosecutor knowingly and intentionally withheld  
13 exculpatory evidence of a digital recording of the initial interview with witness Devon Michael  
14 Clements and (2) the California Court of Appeal failed to hold an evidentiary hearing on the  
15 prosecution's alleged withholding of exculpatory evidence. Lodgment 17. On November 9,  
16 2016, the California Supreme Court denied the petition without a statement of reasoning or  
17 citation to authority. Lodgment 18.

18 Petitioner filed the instant Petition for Writ of Habeas Corpus on February 1, 2017. Pet.

### 19 **SCOPE OF REVIEW**

20 Title 28, United States Code, § 2254(a), sets forth the following scope of review for  
21 federal habeas corpus claims:

22 The Supreme Court, a Justice thereof, a circuit judge, or a district court shall  
23 entertain an application for a writ of habeas corpus in behalf of a person in custody  
24 pursuant to the judgment of a State court only on the ground that he is in custody  
25 in violation of the Constitution or laws or treaties of the United States.

26 28 U.S.C. § 2254(a) (2006 & Supp. 2016).

27 The Petition was filed after enactment of the Anti-terrorism and Effective Death Penalty  
28

1 Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. Under 28 U.S.C. § 2254(d), as  
2 amended by AEDPA:

3 (d) An application for a writ of habeas corpus on behalf of a person in custody  
4 pursuant to the judgment of a State court shall not be granted with respect to any  
5 claim that was adjudicated on the merits in State court proceedings unless the  
6 adjudication of the claim—

7 (1) resulted in a decision that was contrary to, or involved an unreasonable  
8 application of clearly established Federal law, as determined by the  
9 Supreme Court of the United States; or

10 (2) resulted in a decision that was based on an unreasonable determination  
11 of the facts in light of the evidence presented in the State court proceeding.

12 In making this determination, a court may consider a lower court's analysis. Ylst v. Nunnemaker,  
13 501 U.S. 797, 803-04 (1991) (authorizing a reviewing court to look through to the last reasoned  
14 state court decision). Summary denials are presumed to constitute adjudications on the merits  
15 unless "there is reason to think some other explanation for the state court's decision is more  
16 likely." Harrington v. Richter, 562 U.S. 86, 99-100 (2011).

17 A state court's decision is "contrary to" clearly established federal law if the state court:  
18 (1) "applies a rule that contradicts the governing law set forth in [Supreme Court] cases"; or (2)  
19 "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme]  
20 Court and nevertheless arrives at a result different from [Supreme Court] precedent." Williams  
21 v. Taylor, 529 U.S. 362, 405-06 (2000) (O'Connor, J., concurring).

22 A state court's decision is an "unreasonable application" of clearly established federal law  
23 where the state court "identifies the correct governing legal principle from [the Supreme] Court's  
24 decisions but unreasonably applies that principle to the facts of the prisoner's case." Lockyer  
25 v. Andrade, 538 U.S. 63, 75 (2003) (quoting Williams, 529 U.S. at 413). "[A] federal habeas  
26 court may not issue [a] writ simply because that court concludes in its independent judgment  
27 that the relevant state-court decision applied clearly established federal law erroneously or  
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1 incorrectly. Rather, that application must be objectively unreasonable.” Id. at 75-76 (citations  
2 and internal quotation marks omitted). Clearly established federal law “refers to the holdings,  
3 as opposed to the dicta, of [the Supreme] Court’s decisions as of the time of the relevant state-  
4 court decision.” Williams, 529 U.S. at 412.

5 If the state court provided no explanation of its reasoning, “a habeas court must  
6 determine what arguments or theories supported or . . . could have supported, the state court’s  
7 decision; and then it must ask whether it is possible fairminded jurists could disagree that those  
8 arguments or theories are inconsistent with the holding in a prior decision of [the Supreme  
9 Court].” Harrington, 562 U.S. at 102. In other words, a federal court may not grant habeas  
10 relief if any fairminded jurist could find the state court’s ruling consistent with relevant Supreme  
11 Court precedent. Id.

12 Habeas relief also is available if the state court’s adjudication of a claim “resulted in a  
13 decision that was based on an unreasonable determination of the facts in light of the evidence  
14 presented in the state court proceeding.” 28 U.S.C. § 2254(d)(2) (West 2012); Wood v. Allen,  
15 558 U.S. 290, 293 (2010). A state court’s decision will not be overturned on factual grounds  
16 unless this Court finds that the state court’s factual determinations were objectively  
17 unreasonable in light of the evidence presented in state court. See Miller-El, 537 U.S. at 340;  
18 see also Rice v. Collins, 546 U.S. 333, 341-42 (2006) (the fact that “[r]easonable minds reviewing  
19 the record might disagree” does not render a decision objectively unreasonable). This Court will  
20 presume that the state court’s factual findings are correct, and Petitioner may overcome that  
21 presumption only by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); Schriro v.  
22 Landrigan, 550 U.S. 465, 473-74 (2007).

## 23 **DISCUSSION**

24 Petitioner presents five grounds for relief. First, Petitioner claims the prosecution  
25 knowingly and intentionally withheld exculpatory evidence – a digital recording of statements  
26 made by witness Devon Michael Clements. Pet. at 6. Second, Petitioner alleges the California  
27 Court of Appeal erred by not holding an evidentiary hearing on the prosecution’s alleged  
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1 withholding of evidence. Id. at 7. Third, Petitioner argues his Faretta rights were violated when  
2 the San Diego County Jail (“Jail”) made decisional and statutory law available via a “kiosk”  
3 separate from the desktop with a word processor and denied him access to confidential legal  
4 phone calls and black ink pens. Id. at 8. Fourth, Petitioner asserts that the Jail’s desktop  
5 computer obstructed his ability to properly review audio and video discovery produced by the  
6 prosecution, the office of assigned counsel failed to properly serve his legal documents, and Jail  
7 officials refused to provide Petitioner with sufficient copies to serve legal documents by mail.  
8 Id. at 9. Fifth, Petitioner claims the trial court erred by denying his motion for acquittal under  
9 section 1118.1 because there was insufficient evidence to find Petitioner did not act in self-  
10 defense. Id. at 10.

11 **A. The Prosecution’s Alleged Withholding or Destruction of Exculpatory Evidence**

12 Petitioner alleges that the prosecution knowingly and intentionally withheld a digital  
13 recording of an interview conducted by San Diego Police Detective Christopher Tews of witness  
14 Devon Michael Clements at the Peachtree Inn Residential Hotel on June 21, 2013. Id. at 6.  
15 Petitioner further alleges that the prosecution later presented false testimony from Detective  
16 Tews that a digital recording of the interview with Mr. Clements does not exist. Id. In support,  
17 Petitioner claims that Mr. Clements acknowledged the existence of the recorded interview at the  
18 preliminary hearing held on October 8, 2013, and that Detective Tews’ incident report referenced  
19 the recorded interview. Id.

20 Respondent contends that Petitioner received one recording of the interview between  
21 Detective Tews and Mr. Clements from a different date and that there is not a second recording.  
22 Answer at 16. Accordingly, Respondent asserts that the prosecution neither withheld  
23 exculpatory evidence nor destroyed it. Id. In his Supplemental Traverse, Petitioner concedes  
24 that he received a copy of a recorded interview from a different date, but clarifies that he never  
25 received a copy of the June 21, 2013 interview. Supp. Traverse at 12-13, 15. Petitioner also  
26 admits that he received a copy of Detective Tews’ report summarizing his June 21, 2013  
27 interview of Mr. Clements. See ECF No. 16 at 15-21; see also Lodgment 1-8 at 902-08

1 (referencing the report).

2 Petitioner presented his claim to the California Court of Appeal and the California Supreme  
3 Court in a Petition for Writ of Habeas Corpus. Lodgments 13, 17. The Court of Appeal denied  
4 the claim in a reasoned opinion. Lodgment 14. The California Supreme Court denied the claim  
5 without a statement of reasoning or citation to authority. Lodgment 18. The Court will therefore  
6 look through the silent denial by the state supreme court to the appellate court opinion. Ylst,  
7 501 U.S. at 804. In denying the claim, the appellate court stated the following:

8 In his writ petition, [Petitioner] claims that the prosecution failed to produce  
9 exculpatory evidence or, alternatively, destroyed it before trial. [Petitioner]  
10 contends the police recorded an interview with an eyewitness to the assault, but  
11 denied the existence of the recording when [Petitioner] requested a copy before  
12 trial. He suggests the prosecution is either hiding the recording or destroyed it to  
13 prevent having to disclose it. He alleges that he asked his appellate counsel to  
14 raise this issue on direct appeal, but counsel refused to do so.

15 The prosecution has a duty to disclose evidence to a criminal defendant  
16 when the evidence is both favorable to the defendant and material on either guilt  
17 or punishment. (In re Miranda (2008) 43 Cal.4th 541, 575.) Evidence is material  
18 if there is a reasonable possibility that, had it been disclosed to the defense, the  
19 result of the trial would have been different. (Ibid.) "Such a probability exists  
20 when the undisclosed evidence reasonably could be taken to put the whole case  
21 in such a different light as to undermine confidence in the verdict." (Ibid.)

22 [Petitioner] provides no explanation for the materiality of the alleged  
23 recording. He was provided with notes from the interview and it appears both the  
24 interviewing officer and the eyewitness testified at trial. His claim that the  
25 recording may have included additional or contradictory information is entirely  
26 speculative and [Petitioner] fails to demonstrate the materiality of the alleged  
27 undisclosed information.

28 To the extent [Petitioner] is claiming that the police or prosecution  
destroyed the exculpatory evidence contained in the recording, he makes no  
allegation or showing of bad faith. Thus, [Petitioner] must demonstrate the

1 materiality of the allegedly destroyed evidence. (See, e.g., People v. Alvarez  
2 (2014) 229 Cal.App.4th 761, 771-773.) As discussed above, [Petitioner] makes no  
3 such showing.

4 Lodgment 14 at 1-2.

### 5 **1. Withholding of Evidence**

6 Petitioner is not entitled to federal habeas relief for his claim that his constitutional rights  
7 were violated when the prosecution failed to provide an audio recording of the June 21, 2013  
8 interview of Mr. Clements. The United States Supreme Court has held that the “suppression by  
9 the prosecution of evidence favorable to an accused upon request violates due process where  
10 the evidence is material either to guilt or to punishment, irrespective of the good faith or bad  
11 faith of the prosecution.” Brady v. Maryland, 373 U.S. 83, 87 (1963). Evidence is material “if  
12 there is a reasonable probability that, had the evidence been disclosed to the defense, the result  
13 of the proceeding would have been different. A reasonable probability is a probability sufficient  
14 to undermine the confidence in the outcome.” United States v. Bagley, 473 U.S. 667, 682  
15 (1985). To prevail on a Brady claim, a petitioner must show that: (1) the evidence was favorable  
16 to the accused either because it was exculpatory or impeaching; (2) the evidence was  
17 suppressed by the State; and (3) the suppression resulted in prejudice. Strickler v. Greene, 527  
18 U.S. 263, 281-82 (1999). In determining prejudice, the question is “whether the favorable  
19 evidence could reasonably be taken to put the whole case in such a different light as to  
20 undermine confidence in the verdict.” Id. at 290 (quoting Kyles v. Whitley, 514 U.S. 419, 435  
21 (1995)).

22 Here, the appellate court determined that the first and third elements had not been met,  
23 and as a result, declined to analyze whether the second element was met. See Lodgment 14.  
24 In concluding the alleged evidence was not prejudicial to Petitioner, the appellate court  
25 determined that Petitioner failed to establish the materiality of the alleged recording. Id. at 1.  
26 The appellate court noted that Petitioner was provided with notes from the interview and both  
27 the interviewing officer and witness testified at trial. Id. at 1-2. The appellate court concluded  
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1 that Petitioner's claim that the alleged recording might have included additional or contradictory  
2 information is "entirely speculative." Id. at 2. There is substantial evidence in the record  
3 supporting the appellate court's conclusion.

4 First, Petitioner makes no showing that the alleged recording was favorable to him.  
5 Petitioner does not allege that Mr. Clements' interview from June 21, 2013 contains any  
6 exculpatory or impeaching information. See Pet. at 6; see also Supp. Traverse at 11-19.  
7 Petitioner merely explains that Detective Tews indicated in his investigative report that he  
8 recorded an interview with Mr. Clements on the night of the incident, June 21, 2013, but later  
9 testified that he did not record the interview. Supp. Traverse at 14-16. This is supported by  
10 the record. Detective Tews testified that he interviewed Mr. Clements on June 21, 2013, but  
11 that he did not record the interview. Lodgment 1-8 at 900-01. Detective Tews explained that  
12 he errantly wrote that the interview was recorded in his investigative report. Id. at 901; see  
13 ECF No. 16 at 16 (Detective Tews' ivestigative report, which states "I went to the office and  
14 interviewed Clements. I recorded the conversation using my digital voice recorder."). Detective  
15 Tews testified that he recorded a subsequent interview he conducted with Mr. Clements.  
16 Lodgment 1-8 at 901. During cross-examination, Mr. Clements indicated that "to [his]  
17 knowledge" Detective Tews recorded his June 21, 2013 interview, but did not know for certain.  
18 Lodgment 1-7 at 770-71.

19 Further, Mr. Clements' trial testimony was consistent with the information provided by  
20 Mr. Clements in the June 21, 2013 interview as set forth in the written report prepared by  
21 Detective Tews and provided to Petitioner before trial. See Lodgments 1-7 at 718-71; 1-8 at  
22 902-21, 923-24, 973-94, and 1008; 1-9 at 1130-32 and 1195-97; see also ECF 16 at 19.  
23 Detective Tew's Investigator's Report from June 21, 2013 describes the interview of Mr.  
24 Clements. ECF No. 16 at 19. It states that:

25 Clements told me essentially the following: Is this gonna be played in court?  
26 I do not want that to happen because I feel my life is in danger. I got woken up  
27 by my friend Casey and was told that [Mr. Morao] was outside my door. [Mr.

1 Morao] was angry and pissed. [Mr. Morao] would not tell me what was going on  
2 so I just followed him. [Mr. Morao] and the guy had a problem. The guy's name  
3 was Brian[, the Petitioner]. I was waiting here out front. [Mr. Morao] and  
4 [Petitioner] went and fought by the tuxedo shop. I thought they were boxing each  
5 other and had no idea he had a knife. I never saw a knife. The fight lasted one  
6 minute. [Mr. Morao] came back to me and shook my hand. [Mr. Morao] said I  
7 got him. I have no idea what the fight was about. After that [Mr. Morao] realized  
8 he was bleeding. We went to the lobby. I got paper towels to plug him up.

9 There is no ongoing beef between them that I know of. I have known  
10 [Petitioner] for two months. I do not know if they are involved in any illegal  
11 activity. I do not know if they drank or did drugs together. I know where  
12 [Petitioner's] room was. I have not had anything to drink tonight. I have not used  
13 any drugs. I took my Seroquel medication.

14 [Petitioner] told me I was a dead man when [Mr. Morao] and I walked  
15 away. I watched the fight from about twenty feet away. It was a good distance  
16 like sixty feet. It could have been half a block away. They just fought and threw  
17 punches. They yelled at each other. I do not know what they were saying.  
18 [Petitioner] said, "c'mon' but I do not really remember. I don't know what this  
19 fight was over. They were both heated and [Petitioner] provoked it all. I did ask  
20 [Mr. Morao] what was going on and he did not answer me. [Mr. Morao] did not  
21 appear to be drinking or using drugs. I have seen [Petitioner] angry and blow  
22 things out of proportion. [Petitioner] always thinks someone is after him and I  
23 think he uses drugs. [Petitioner] has freaked out on people. One time [Petitioner]  
24 thought I took his cell phone and that it was captured on camera.

25 Id. During trial, Mr. Clements testified that on June 21, 2013, Mr. Morao came by his room at  
26 the Peachtree Inn in an agitated and angry state. Lodgment 1-7 at 736-37. Mr. Clements then  
27 followed Mr. Morao outside and observed Petitioner and Mr. Morao argue as they walked down  
28 the street. Id. at 689-92, 741. Mr. Clements followed the two at a distance and observed the  
two fighting. Id. at 692-96, 759-60, 767. Mr. Clements testified that he saw Petitioner strike  
Mr. Morao with something cylindrical that was about a foot and a half long with a sharp point at  
the end. Id. at 696-98, 763-65, 797-98. After the fight, Mr. Morao and Mr. Clements gave each

1 other celebratory hand gestures, or “daps.” Id. at 704, 767. Only after giving each other “daps”  
2 did Mr. Morao realize he was bleeding. Id. at 707-08. Mr. Clements testified that Mr. Morao  
3 was bleeding from the lower torso area and Mr. Clements used napkins to try to stop the  
4 bleeding. Id. at 708-09, 759-60. He also testified that he truthfully told Detective Tews about  
5 the incident on June 21, 2013. Id. at 701.

6 Mr. Clements’ testimony at trial and Detective Tews’ June 21, 2013 Investigator’s Report  
7 are consistent and, therefore, the information is not impeaching. See United States v. Johnson,  
8 403 Fed. App’x 146, 149 (9th Cir. 2010) (finding that the allegedly withheld evidence was not  
9 impeaching because the redacted testimony was consistent with evidence produced at trial).  
10 The consistency also undercuts any argument that the digital recording might have contained  
11 information not set forth in Detective Tews’ written report. Further, Mr. Clements’ interview  
12 statements from June 21, 2013 were not exculpatory because they do not suggest that Petitioner  
13 was not guilty or less guilty. See Morris v. Ylst, 447 F.3d 735, 740 (9th Cir. 2006) (stating that  
14 suppressed evidence is not exculpatory if the evidence fails to show that “the [defendant is] *not*  
15 guilty, or that he [is] any *less* guilty”) (emphasis in original). Accordingly, Petitioner has failed  
16 to show that the alleged audio recording from June 21, 2013 contained any exculpatory or  
17 impeaching evidence favorable to him. See Pitts v. Woodford, 2009 WL 2984159, at \*15 (C.D.  
18 Cal. Aug. 31, 2009) (finding no Brady violation where the petitioner made no showing that a  
19 police interview tape contained information favorable to the petitioner); Brock v. Lea, 2011 WL  
20 7277422, at \*13-14 (C.D. Cal. Sept. 9, 2011) (finding no Brady violation where the petitioner  
21 alleged a police officer falsely testified she did not record an interview of the victim and the  
22 alleged recording was withheld by the prosecution because the testimony the victim gave and  
23 the testimony the officer gave at trial were consistent). Petitioner also has failed to show that  
24 the alleged recording contained any information not contained in Detective Tews’ written report.

25 Second, the record supports a finding that the prosecution did not suppress an audio  
26 recording of the interview between Detective Tews and Mr. Clements on June 21, 2013. On  
27 December 10, 2013, Petitioner told the trial court that the prosecution provided him with a media  
28

1 disc and thumb drive with video recordings and audio recordings, but that Petitioner could not  
2 play them on the Jail's equipment and the Office of Assigned Counsel also could not get the disc  
3 and thumb drive to work. Lodgment 1-3 at 251-52. The trial court ordered the prosecution to  
4 bring a laptop, the media disc, and the thumb drive to court the following day to allow Petitioner  
5 to view the evidence. Id. at 259-61. On December 11, 2013, the trial court provided Petitioner  
6 time to review the media disc and thumb drive on the prosecution-provided laptop and indicated  
7 they would regroup the next day to discuss any issues regarding the media. Id. at 268-69. On  
8 December 12, 2013, Petitioner informed the court that the "separate" recording of the Clements  
9 interview was not on the media disc or thumb drive. Id. at 274. The prosecution explained that  
10 there is only one recording of Mr. Clements and that the prosecution provided that recording to  
11 Petitioner. Id. at 274-75. On December 13, 2013, Petitioner told the trial court that "there is a  
12 report that specifically states that there was a recording made of an interview of Devon Clements  
13 . . . . However, you know, the prosecution now would contend that the officer said there was  
14 no recording. However, in his report, it states he recorded." Lodgment 1-4 at 408. The  
15 prosecution responded that "the detective t[old him] he recorded Devon Clements one time.  
16 Devon Clements tells me he was recorded one time. The recording of that conversation,  
17 [Petitioner] has had." Id. Petitioner asserted that there are three recordings. Id. The trial  
18 court advised Petitioner to recheck his data because the word "recorded" could refer to notes  
19 and not audio recordings. Id. at 409.

20 On December 17, 2013, the prosecution reiterated to Petitioner and the trial court that  
21 there is only one audio recording involving Mr. Clements and Detective Tews. Lodgment 1-5 at  
22 471, 473. The prosecution then provided Petitioner with newly obtained handwritten notes  
23 taken by Detective Tews that were incorporated into his report. Id. at 471-72. Petitioner again  
24 voiced his objection, stating that there were additional audio recordings between Detective Tews  
25 and Mr. Clements. Id. at 473-74. The trial court concluded:

26 All right. So here's the issue, then. Mr. – the – officer Tews says he only  
27 recorded him once. You believe that's incorrect. And according to you, you saw

1 notes where Mr. Clements said he spoke to him twice and was recorded twice.  
2 That is, again, something you will have to do through cross-examination of both  
3 of them, Tews and Clements, because he's denying it. So you'll have to cross-  
4 examine to find out what the differences were. And they're saying there's not a  
5 second tape. So that's only through cross-exam.

6 [The prosecutor] said he specifically asked him the question and Tews  
7 denied it. So at that point, he's stuck. You'll have to cross-examine on that issue  
8 through Clements and through Tews.

9 Id. at 474. The prosecutor and Detective Tews both stated on the record that there is no  
10 recording of the June 21, 2013 interview of Mr. Clements and Petitioner has not provided  
11 evidence countering their statements. Lodgments 1-8 at 900-01; 1-3 at 274-75; 1-5 at 471-73;  
12 see Pet.; see also Supp. Traverse. Further, Petitioner had Detective Tews' Investigator's Report  
13 from June 21, 2013, which included a summary of the statement provided by Mr. Clements.  
14 ECF No. 16 at 15-21. Petitioner had this report during trial and asked whether the information  
15 contained in the report was truthful. See Lodgment 1-8 at 902-08 (referencing Detective Tews'  
16 June 21, 2013 report). Detective Tews testified that the information in his report was accurate.  
17 Id. at 902. As discussed previously, Detective Tews' report and Mr. Clements testimony are  
18 consistent. As a result, there is no evidence to support Petitioner's claims that the tape existed  
19 and that the government suppressed it other than the single sentence in Detective Tews' report  
20 which he admitted was false.

21 Third, even if the interview between Mr. Clements and Detective Tews had been digitally  
22 recorded, Petitioner must show that the prosecution's failure to produce the recording "was so  
23 serious that there is a reasonable probability that the suppressed evidence would have produced  
24 a different verdict." Strickler, 527 U.S. at 281. Petitioner does not satisfy this standard.  
25 Petitioner offers no explanation about what statements the June 21, 2013 interview contained  
26 that would have created a reasonable probability of a different verdict. United States v. Agurs,  
27 427 U.S. 97, 109-10 (1976) ("The mere possibility that . . . undisclosed information might have  
28 helped the defense, or might have affected the outcome of the trial, does not establish

1 'materiality' in the constitutional sense."); Crawford v. Head, 311 F.3d 1288, 1329 (11th Cir.  
2 2002) (this court "cannot consider conjecture" about what evidence "might have shown" in  
3 deciding a Brady claim). Rather, the record indicates that any recording of Mr. Clements'  
4 interview would be consistent with Detective Tews' written report and the testimony of both  
5 Detective Tews and Mr. Clements.

6 Accordingly, the Court of Appeal's conclusion that Petitioner had not established that the  
7 prosecution withheld exculpatory or impeaching evidence is not contrary to or an unreasonable  
8 application of clearly established Federal law.

## 9 **2. Destruction of Evidence**

10 Petitioner also contends that the alleged June 21, 2013 recording was inappropriately  
11 destroyed. Pet. at 6; Supp. Traverse at 11. Petitioner argues that, based on Detective Tews'  
12 report referencing a digital recording and Mr. Clements' testimony that he thought the June 21,  
13 2013 interview was recorded, the prosecution and/or Detective Tews "eliminated" the audio  
14 recording. Pet. at 6; Supp. Traverse at 11-12. Petitioner also alleges that, to cover up the  
15 existence of the recording, Detective Tews' provided false testimony at trial explaining there is  
16 no audio recording. Pet. at 6; Supp. Traverse at 15.

17 The Supreme Court has held that where the government fails to preserve evidence that  
18 is only potentially exculpatory, the right to due process is violated only if it possesses "an  
19 exculpatory value that was apparent before the evidence was destroyed, and [is] of such a  
20 nature that the defendant would be unable to obtain comparable evidence by other reasonably  
21 available means." California v. Trombetta, 467 U.S. 479, 489 (1984). The Supreme Court has  
22 also held that the defendant must also demonstrate the government's bad faith in failing to  
23 preserve the potentially useful evidence. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); see  
24 United States v. Booth, 309 F.3d 566, 574 (9th Cir. 2002).

25 Detective Tews testified that he did not record the interview with Mr. Clements on June  
26 21, 2013. Lodgment 1-8 at 900-01. However, Detective Tews did take four pages of  
27 handwritten notes on the interview and also prepared an investigative report summarizing the  
28

1 interview – both of which were provided to Petitioner. Lodgment 1-5 at 471-72; ECF No. 16 at  
2 19. Additionally, Detective Tews and Mr. Clements testified and were subject to Petitioner’s  
3 cross-examination at trial. See Lodgments 1-7 at 687-805; 1-8 at 889-1012; 1-9 at 1130-45;  
4 1193-97. Petitioner’s mere speculation that there was a recording, that it was destroyed, and  
5 that it contained relevant additional information not reflected in the notes, report, or testimony  
6 of Mr. Clements and Detective Tews is insufficient to carry his burden of showing that the  
7 California Court of Appeal and California Supreme Court could not reasonably have found such  
8 a recording did not possess exculpatory value that was apparent at the time it was allegedly  
9 destroyed. See Brock, 2011 WL 7277422, at \*14-15 (C.D. Cal. Sept. 9, 2011). Moreover,  
10 Petitioner has failed to show that there was a recording to begin with. Petitioner also has failed  
11 to show that Detective Tews or the prosecution acted in bad faith by destroying the audio  
12 recording of the interview with Mr. Clements where the substance of the interview was recorded  
13 in Detective Tews’ investigative report and contained in four pages of handwritten notes. See  
14 e.g., Villafuerte v. Stewart, 111 F.3d 616, 625 (9th Cir. 1997) (“a negligent investigation does  
15 not violate [defendant’s] due process rights”), cert denied, 522 U.S. 1079 (1998).

16 Thus, the Court of Appeal’s decision that Petitioner did not establish that the prosecution  
17 or police destroyed evidence was not contrary to or an unreasonable application of clearly  
18 established Federal law.

### 19 **3. Conclusion**

20 Petitioner has not established that there was an audio recording of Mr. Clements’ June  
21 21, 2013 interview, that the government suppressed or destroyed the recording, and that the  
22 recording contained favorable information, not present in Detective Tews’ handwritten notes or  
23 written report, that would have changed the outcome of the trial. Therefore, the Court finds  
24 that the California Court of Appeal and California Supreme Court’s decisions were not contrary  
25 to or an unreasonable application of clearly established Federal law and **RECOMMENDS** that  
26 Petitioner’s first ground for relief be **DENIED**.

27 //

1 **B. California Court of Appeal’s Failure to Hold an Evidentiary Hearing**

2 In his second claim, Petitioner alleges the California Court of Appeal erred by failing to  
3 hold an evidentiary hearing in his post-conviction proceedings on the prosecution’s alleged  
4 withholding of evidence. Pet. at 7. In support, Petitioner opines that the Court of Appeal is  
5 “incapable of making a determination [of whether the recording is exculpatory evidence] without  
6 itself reviewing the recording.” Id. Respondent contends that AEDPA does not require states  
7 to conduct evidentiary hearings, and therefore, Petitioner’s second claim should be denied.  
8 Answer at 21-22.

9 Petitioner’s claim is not cognizable in this federal habeas petition. “A postconviction  
10 proceeding is not part of the criminal process itself, but is instead a civil action designed to  
11 overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the  
12 States to provide [an evidentiary hearing.]” Murray v. Giarratano, 492 U.S. 1, 13 (1989)  
13 (O’Connor, J., concurring). Thus, complaints about asserted errors in the state post-conviction  
14 process may not be considered on federal habeas review. See e.g., Franzen v. Brinkman, 877  
15 F.2d 26, 26 (9th Cir. 1989) (per curiam) (“a petition alleging errors in the state post-conviction  
16 review process is not addressable through habeas corpus proceedings”); see also Ortiz v.  
17 Stewart, 149 F.3d 923, 939 (9th Cir. 1998) (“federal habeas relief is not available to redress  
18 alleged procedural errors in state post-conviction proceedings”); Gerlaugh v. Stewart, 129 F.3d  
19 1027, 1045 (9th Cir. 1997) (errors committed during state post-conviction proceedings are not  
20 cognizable in a federal habeas action); Villafuerte, 111 F.3d at 632 n.7 (claim that petitioner  
21 “was denied due process in his state habeas corpus proceedings” was not cognizable on federal  
22 habeas review). Accordingly, the Court **RECOMMENDS** that Petitioner’s Petition be **DENIED**  
23 on this ground. See Gentry v. Sinclair, 576 F. Supp. 2d 1130, 1170 (W.D. Wash. Sept. 15, 2008)  
24 (finding the petitioner’s claim that the state court’s failure to hold an evidentiary hearing during  
25 the post-conviction proceedings not cognizable on federal habeas review).

26 **C. Petitioner’s Faretta Rights Violations**

27 In his third and fourth claims, Petitioner alleges that the Jail’s policies violated Petitioner’s  
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1 Faretta rights. Pet. at 8-9. In his third claim, Petitioner alleges that the Jail denied him access  
2 to confidential legal phone calls necessary for trial preparation, and black ink pens to comply  
3 with the rules of the court.<sup>2</sup> Id. Respondent contends that issues in the Jail concerning the  
4 monitoring of telephone calls and the issuance of pencils rather than pens are not a basis for  
5 finding a constitutional violation. Answer at 22.

6 In Petitioner's fourth claim, he alleges that the Jail failed to provide a desktop computer  
7 with a word processor and legal reference capabilities, that the Jail's desktop computer system  
8 was incapable of showing audio and video evidence produced by the prosecution, that the Office  
9 of Assigned Counsel failed to properly serve legal documents upon the prosecution, and that jail  
10 officials refused to provide Petitioner with sufficient copies of legal documents to serve the  
11 prosecution by mail. Pet. at 8-9. Petitioner acknowledges that the Jail has a "kiosk" with legal  
12 reference capabilities, but alleges that it is separate from the desktop with word processing  
13 software on it, which makes copying legal research and pasting it into a word processing  
14 document impossible. Id. Respondent contends there is not United States Supreme Court  
15 precedent requiring jails to provide kiosks linked to a computer with a word processor and legal  
16 reference materials, nor is there a constitutional violation when a county jail computer cannot  
17 read a thumb drive. Answer at 23. Respondent also asserts there is no constitutional violation  
18 where jail personnel failed to make sufficient copies of motions for service by mail where the  
19 petitioner had the services of a runner. Id. In his Supplemental Traverse, Petitioner counters  
20 that Supreme Court precedent requires prisoners to have an adequate law library and that the  
21 legal reference kiosk being separate from the word processor desktop is inadequate. Supp.  
22 Traverse at 31.

23 Petitioner presented these claims to the California Court of Appeal and the California  
24 Supreme Court. See Lodgments 11, 15. The Court of Appeal did not address the merits and  
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26 <sup>2</sup> Petitioner also alleges that the Jail's "kiosk" for legal research being separate from the desktop  
27 with a word processing program violated his rights. Pet. at 9. The Court addresses this claim  
28 under his fourth ground for relief and will not address the claim under his third ground for relief.

1 denied the claim as being untimely. Lodgment 12. The California Supreme Court denied the  
2 claim without a statement of reasoning or citation to authority. Lodgment 16. Respondent did  
3 not assert an affirmative defense that this claim is procedurally defaulted because it is untimely.  
4 See Answer. Absent extraordinary circumstances, a procedural default argument is waived by  
5 failing to raise it. Brown v. Maass, 11 F.3d 914, 914-15 (9th Cir. 1993); Franklin v. Johnson,  
6 290 F.3d 1223, 1231, 1232-33 (9th Cir. 2002) (in post-AEDPA cases, a state waives a procedural  
7 bar argument by failing to raise it in the first responsive pleading); Morrison v. Mahoney, 399  
8 F.3d 1042, 1046-47 (9th Cir. 2005) (holding that “the defense of procedural default should be  
9 raised in the first responsive pleading in order to avoid waiver”).

10 Under AEDPA, federal courts apply a “highly deferential standard for evaluating state-  
11 court rulings,” which demands that state-court decisions be given the benefit of the doubt.”  
12 Woodford v. Viscotti, 537 U.S. 19, 24 (2002) (per curiam). However, “when it is clear that a  
13 state court has not reached the merits of a properly raised issue, we must review it *de novo*.”  
14 Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002) (citation omitted). Accordingly, this Court  
15 will review Petitioner’s Faretta claims *de novo*. See Yates v. Ryan, 2008 WL 2757285, at \*2  
16 (N.D. Cal. July 14, 2008) (stating that where a respondent fails to raise the issue of a procedural  
17 bar in its answer and instead addressed the merits of a petitioner’s claims, the court reviews the  
18 merits of the claims).

19 In Faretta v. California, the Supreme Court held that, “[a]lthough not stated in the [Sixth]  
20 Amendment in so many words, the right to self-representation – to make one’s own defense  
21 personally – is . . . necessarily implied by the structure of the Amendment.” Faretta v. California,  
22 422 U.S. 806, 819 (1975). This right contemplates a defendant’s active and meaningful  
23 participation in the trial:

24 A defendant’s right to self-representation plainly encompasses certain specific  
25 rights to have his voice heard. The *pro se* defendant must be allowed to control  
26 the organization and content of his own defense, to make motions, to argue points  
27 of law, to participate in *voir dire*, to question witnesses, and to address the court  
28 and the jury at appropriate points in the trial.

1 McKaskle v. Wiggins, 465 U.S. 168, 174 (1984). The Ninth Circuit has held that “time to prepare  
2 and some access to materials and witnesses are fundamental to a meaningful right of  
3 representation,” and that “[a]n incarcerated defendant may not meaningfully exercise his right  
4 to represent himself without access to law books, witnesses, or other tools to prepare a defense.”  
5 Milton v. Morris, 767 F.2d 1443, 1446 (9th Cir. 1985) (citing Faretta, 422 U.S. at 818); see also  
6 United States v. Sarno, 73 F.3d 1470, 1491 (9th Cir. 1995) (“[T]he Sixth Amendment demands  
7 that a *pro se* defendant who is incarcerated be afforded reasonable access to ‘law books,  
8 witnesses, or other tools to prepare a defense.’” (quoting Milton, 767 F.2d at 1446)). “The  
9 right of access is not unlimited, but must be balanced against the legitimate security needs or  
10 resource constraints of the prison.” Sarno, 73 F.3d at 1491 (citing United States v. Robinson,  
11 913 F.2d 712, 717 (9th Cir. 1990) *cert. denied*, 498 U.S. 1104 (1991); Lindquist v. Idaho State  
12 Bd. Of Corrections, 776 F.2d 851, 858 (9th Cir. 1985); Milton, 767 F.2d at 1446-47). However,  
13 the Supreme Court has observed that “Faretta says nothing about any specific legal aid that the  
14 State owes a *pro se* criminal defendant,” such as access to adequate *pro se* resources. Kane v.  
15 Garcia Espitia, 546 U.S. 9, 10 (2005) (per curiam).

16 In the absence of clearly established federal law on the issue of specific legal resources  
17 constitutionally required for a *pro se* criminal defendant, Petitioner is not entitled to federal  
18 habeas relief on this claim. See Kane, 546 U.S. at 10 (claimed violation of law library access  
19 right for self-represented criminal defendant could not afford basis for federal habeas relief).  
20 Because “[t]he Supreme Court has never established a clear Sixth Amendment right of access  
21 to legal materials for pro se defendants,” the appellate courts’ rejection of Petitioner’s claim was  
22 not contrary to, or an objectively unreasonable application of, any clearly established federal  
23 law as determined by the United States Supreme Court. Reed v. Schriro, 290 Fed. App’x 982,  
24 984 (9th Cir. 2008); see also Thomas v. Muniz, 2016 WL 4191276, at \*12 (C.D. Cal. Jan. 22,  
25 2016) (finding that the Supreme Court has never established a clear Sixth Amendment right of  
26 access to legal materials for criminal defendants representing themselves); Lathan v. Felker,  
27 2010 WL 958947, at \*12 (C.D. Cal. Jan. 21, 2010) (“Because no clearly established Supreme  
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1 Court law requires the state to supply a *pro se* criminal defendant with books and tools assertedly  
2 needed to present a defense, Petitioner is not entitled to habeas relief on his Faretta claim.”);  
3 Ringo v. Marshall, 2010 WL 1444688, at \*13 (C.D. Cal. Feb. 23, 2010) (denying federal habeas  
4 relief where the petitioner alleged he did not have access to a law library while representing  
5 himself because the Supreme Court has never established that a *pro se* defendant has right of  
6 access to legal materials).

7 Further, Petitioner does not establish any specific injury or prejudice arising out of  
8 allegedly deficient legal resources and the record in this case reflects that the trial court  
9 adequately addressed the issues raised by Petitioner. See Pet.; see also Supp. Traverse. For  
10 example, on November 21, 2013, Petitioner complained that he could not comply with the rules  
11 of court requiring handwritten motions to be in black ink because the Jail only provides inmates  
12 with “golf lead pencils.” Lodgment 1-1 at 2. He also stated that using the golf pencils makes it  
13 difficult for him to even complete motions. Id. at 3. Petitioner explained that he filed a motion  
14 to compel discovery in pencil and because it was not in black ink, the prosecution never received  
15 it. Id. To remedy this error, the trial court permitted Petitioner to “outline what it is [he was]  
16 seeking in discovery” orally before the trial court. Id. The trial court further set a hearing date  
17 to determine whether Petitioner could have access to pens for the following week. Id. at 9 (“I’m  
18 going to ask the Sheriff’s Department, or a Sheriff’s Department representative, to be present  
19 to explain to the court why they can’t provide pens or pen fillers.”).

20 On November 26, 2013, Deputy Sheriff Rhonda Steffen testified that inmates at the Jail  
21 cannot have pens and pen fillers for safety reasons. Id. at 15. She explained that “they have  
22 been fashioned into syringes. They’ve also been fashioned into tattoo kits, and there were the  
23 spreading of infections that resulted. And once you do fashion these types of instruments, they  
24 become in demand. So they were being shared, which again speaks to the spreading of  
25 diseases.” Id. Deputy Sheriff Steffen also stated that “it’s the Sheriff’s policy to use shorter  
26 pencils” because they are less likely to be used as a “stabbing instrument.” Id. After hearing  
27 Deputy Sheriff Steffen’s testimony, the trial court concluded:

1 So I do believe that pencils and pens are significantly different, that the pen has  
2 the ability to be fashioned into a syringe, has the ability to serve as a tattooing  
3 instrument by virtue of the fact that it can be used as a syringe, as articulated by  
4 the representative from the Sheriff. It can be something that's in demand. And  
5 because there are health concerns in the jail on a number of fronts with regard to  
6 disease that can be spread by the use of a syringe and the fact it can be spread  
7 around, the very fact that it can be used by one person who is ill and then used  
8 by a number of other people who are not ill who then become ill jeopardizes the  
9 entire health of the jail. So it seems rational to me.

8 Id. at 16-17. At that same hearing, Petitioner complained he did not have access to a working  
9 phone line to make legal calls. Id. at 24-25. Deputy Sheriff Steffen stated that "the Pro Per  
10 Deputy keeps logs of every phone call or how much phone usage [pro pers] have. If the phone  
11 wasn't serviceable, he would have made a notation of that. I spoke to the Deputy himself, and  
12 the only issues that he remembers [Petitioner] bringing up was the pencil sharpener, to which  
13 he provided him one." Id. at 26. The trial court ordered that Petitioner have access to whatever  
14 communication devices he needed to call the Office of Assigned Counsel by the end of business  
15 that day. Id.

16 On the same day, November 26, 2013, the trial court held a sealed *ex parte* hearing  
17 regarding Petitioner's "*Ex Parte* Notice of Obstruction of Faretta Rights." ECF No. 17 at 51.  
18 Petitioner clarified that he did not have access to pens, to a legal phone for confidential legal  
19 phone calls, and "a bunch of different things." Id. at 52. The trial court asked "so can I just  
20 file this in the file . . . . There's no action for - - you need me to take on this?" Id. Petitioner  
21 stated that the trial court could just place the notice in the file and that the purpose of the  
22 hearing was "just for notice." Id. Petitioner did not raise his concerns regarding the San Diego  
23 County Jail's "kiosk" for legal research being separate from a desktop with a word processor.  
24 See Lodgments 1-1, 1-2, 1-3, 1-4.

25 Moreover, Petitioner does not allege that the trial court would not hear his motions  
26 because they were written in pencil, because Jail officials would not provide sufficient copies for  
27 service and filing of documents, or because the Office of Assigned Counsel failed to properly  
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1 serve the motions. See Pet.; see also Supp. Traverse. In fact, the record reflects that the trial  
2 court heard several of Petitioner’s motions orally whenever he alleged having issues filing or  
3 serving the motion or not being able to complete writing the motion because of the writing  
4 utensils he was given. See Lodgments 1-1, 1-2, 1-3, 1-4. Further, the trial court ordered  
5 Petitioner have access to telephones for legal phone calls. Lodgment 1-1 at 26. While Petitioner  
6 later asserted that he couldn’t call his bank, the trial court informed him that calling the bank  
7 would not be the appropriate way to get information from them and advised him to get the  
8 information through the Office of Assigned Counsel. Lodgment 1-3 at 262-63. Additionally,  
9 Petitioner does not assert how the “kiosk” for legal research being separate from a desktop with  
10 a word processor injured or prejudiced him. See Pet.; see also Supp. Traverse. His Petition and  
11 Supplemental Traverse imply that the separation of the kiosk and desktop are mere  
12 inconveniences. See Pet.; see also Supp. Traverse. Finally, the trial court ensured that Petitioner  
13 could review discovery provided by the prosecution that did not work on the Jail’s computer  
14 systems by permitting Petitioner to review the thumb drive and media disc on a prosecution  
15 provided laptop at the Courthouse. Lodgment 1-3 at 251-74. This negated any prejudice  
16 Petitioner might have endured by the Jail’s computer system’s inability to view the thumb drive  
17 and media disc.

18 In summation, under AEDPA, denial of a self-represented criminal defendant’s access to  
19 legal materials cannot be a basis for relief. Nevertheless, even if Petitioner’s claim is governed  
20 by Ninth Circuit cases recognizing a *pro se* criminal defendant’s Sixth Amendment right of access  
21 to legal resources, the Ninth Circuit has only held that such defendants may not be deprived of  
22 all means of researching and preparing a defense. See Milton, 767 F.2d at 1446. Some  
23 restriction on access to legal materials is permissible. See Bribiesca v. Galaza, 215 F.3d 1015,  
24 1020 (9th Cir. 2000) (acknowledging that restrictions on access to law library based on security  
25 concerns did not offend inmate’s constitutional rights). Here, as discussed in detail above,  
26 Petitioner was not deprived of all access to materials to put on his defense and he does not  
27 specify how his defense was hampered by the restrictions on his access to pens, confidential  
28

1 legal phone calls, inadequate service runners, inadequate copies for service by mail, a computer  
2 system capable of viewing files on a thumb drive and media disc, or a desktop with both word  
3 processing programs and legal research capabilities. Accordingly, the Court **RECOMMENDS**  
4 that Petitioner's third and fourth grounds for relief be **DENIED**.

5 **D. Failure to Grant Motion for Acquittal and Sufficiency of the Evidence**

6 In Petitioner's fifth and final claim, he alleges that the trial court erred by denying his  
7 motion under California Penal Code section 1118.1 for a judgment of acquittal. Pet. at 10. In  
8 support, Petitioner alleges there was insufficient evidence in the prosecution's case to support a  
9 finding that Petitioner did not act in self-defense. Id. Respondent contends there was sufficient  
10 evidence to convict Petitioner of assault and that Petitioner was not acting in self-defense.  
11 Answer at 25-26. Accordingly, Respondent asserts the trial court did not err by denying  
12 Petitioner's motion for acquittal. Id. In his Supplemental Traverse, Petitioner argues there was  
13 insufficient evidence that Petitioner stabbed Morao after he was disarmed. Supp. Traverse at  
14 34-37. Therefore, Petitioner asserts that he was acting in self-defense and could not have been  
15 convicted of assault with a deadly weapon. Id. at 34-38.

16 Petitioner raised this claim on direct review before the California Court of Appeal and the  
17 California Supreme Court. Lodgments 5, 9. The California Court of Appeal affirmed the trial  
18 court's decision and the California Supreme Court denied the claim without a statement of  
19 reasoning or citation to authority. Lodgments 8, 10. The Court will therefore look through the  
20 silent denial by the state supreme court to the appellate court opinion. Ylst, 501 U.S. at 804.  
21 In denying the claim, the appellate court stated the following:

22 *A. Introduction*

23 [Petitioner] moved under section 1118.1 for entry of judgment of acquittal  
24 at the close of the prosecution's case. The trial court denied the motion, finding  
25 the prosecution met its burden of circumstantial and direct evidence, including  
26 evidence sufficient for the issue of self-defense to go to the jury. [Petitioner]  
27 contends the trial court erred, because the prosecution advanced insufficient  
28

1 evidence to show [Petitioner] was not acting in self-defense. We disagree.

2 *B. Standard of Review*

3  
4 ""The standard applied by a trial court in ruling upon a motion for judgment  
5 of acquittal pursuant to section 1118.1 is the same as the standard applied by an  
6 appellate court in reviewing the sufficiency of the evidence to support a conviction,  
7 that is, 'whether from the evidence, including all reasonable inferences to be drawn  
8 therefrom, there is any substantial evidence of the existence of each element of  
9 the offense charged.'" [Citation.] "The purpose of a motion under section 1118.1  
10 is to weed out as soon as possible those few instances in which the prosecution  
11 fails to make even a prima facie case." [Citations.] The question "is simply  
12 whether the prosecution has presented sufficient evidence to present the matter  
13 to the jury for its determination."" (People v. Maciel (2013) 57 Cal.4th 482, 522.)

14  
15 ""In reviewing a challenge to the sufficiency of the evidence, we do not  
16 determine the fact ourselves. Rather, we "examine the whole record in the light  
17 most favorable to the judgment to determine whether it discloses substantial  
18 evidence – evidence that is reasonable, credible and of solid value – such that a  
19 reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."  
20 [Citations.] We presume in support of the judgment the existence of every fact  
21 the trier could reasonably deduce from the evidence."" (People v. Houston (2012)  
22 54 Cal. 4th 1186, 1215.).

23  
24 ""Notably, however, '[r]eview of the denial of a section 1118.1 motion made  
25 at the close of a prosecutor's case-in-chief focuses on the state of the evidence as  
26 it stood at that point.'" (People v. Hajek and Vo (2014) 58 Cal. 4th 1144, 1183.).

27 *C. Assault with a Deadly Weapon and Self-Defense*

28  
29 To convict on assault with a deadly weapon, the prosecution must prove  
30 "[t]he defendant did not act (in self-defense/ [or] in defense of someone else)."  
31 (CALCRIM No. 875.) To determine whether self-defense applies, a trier of fact  
32 generally must determine "whether the circumstances would cause a reasonable  
33 person to perceive the necessity of defense, whether the defendant actually acted  
34 out of defense of himself, and whether the force used was excessive." (People v.

1 Clark (1982) 23 Cal. 4th 82, 92.) “[A]ny right of self-defense is limited to the use  
2 of such force as is reasonable under the circumstances.” (People v. Pinholster  
3 (1992) 1 Cal. 4th 865, 966, overruled on other grounds in People v. Williams (2010)  
4 49 Cal. 4th 405, 459.) “[A]lthough the test is objective, reasonableness is  
5 determined from the point of view of a reasonable person in the defendant’s  
6 position. The jury must consider all the facts and circumstances it might “expect[]  
7 to operate on [defendant’s] mind.”” (People v. Minifie (1996) 13 Cal.2d 673, 675.)  
8 Explained another way, in such cases “[t]he justification of self-defense requires a  
9 double showing: that defendant was actually in fear of his life or serious bodily  
10 injury and that the conduct of the other party was such as to produce the state of  
11 mind in a reasonable person.” (People v. Sonier (1952) 113 Cal.App.2d 277, 278.)

10 [Petitioner] asserts the prosecution failed to prove its case because a  
11 defendant must be allowed to use a weapon other than fists if his own fists are  
12 “inadequate to the task” and he finds himself at risk of serious injury. However,  
13 the record does not establish [Petitioner] was at risk for serious injury during the  
14 fight with Morao. On appeal, [Petitioner] argues “fists can do tremendous  
15 damage” and inflict “great bodily injury,” citing to boxing matches and pictures in  
16 assault cases, but fails to identify any evidence of Morao possessing such  
17 dangerous fists, or any particular fighting expertise. [Petitioner] further speculates  
18 it was possible Morao could have had a weapon other than the pool cue, because  
19 he was a drug user, dealer and criminal and many people now carry concealed  
20 guns. However, [Petitioner] points to no evidence to support any reasonable belief  
21 Morao was armed after [Petitioner] took the pool cue or [Petitioner] was otherwise  
22 under threat of death or great bodily harm. [Notably, [Petitioner] did not present  
23 any evidence at trial as to his state of mind during the fight to support a self-  
24 defense theory. Under [Petitioner’s] theory of the case, he took the pool cue from  
25 Morao, Morao ran from him and was stabbed by someone else.]

23 Under these circumstances, the court properly determined that the  
24 prosecutor presented sufficient evidence to negate [Petitioner’s] self-defense  
25 claim. The evidence viewed most favorably to the prosecution establishes  
26 [Petitioner] used unreasonable force in the fight between two friends, defeating  
27 his claim of lawful self-defense. Earlier in the day, [Petitioner] had hit another  
28 man hard enough to knock him down. Although Morao swung at [Petitioner] with  
part of a pool cue, [Petitioner] disarmed Morao before being struck. Morao was

1 able to get in a number of punches after being disarmed, but [Petitioner] was taller  
2 and had better reach. Morao felt threatened by the size disparity due to  
3 [Petitioner's] advantage of height and "reach." Morao, the smaller man, appeared  
4 intimidated by [Petitioner] at trial. The entire altercation lasted seconds to a  
5 minute, yet Morao suffered multiple stab wounds, including an abdominal wound  
6 that left him hospitalized for a week. [Petitioner] admitted to being in possession  
7 of a foot-long knife with a serrated blade.

8 On this record, there was substantial evidence for a reasonable trier of fact  
9 to conclude that [Petitioner] used excessive force in stabbing a disarmed Morao,  
10 overcoming any claim of lawful self-defense. The trial court did not err in denying  
11 acquittal.

12 Lodgment 8 at 7-11.

13 Pursuant to California Penal Code Section 1118.1, a criminal defendant in California who  
14 believes that the prosecution has failed to meet its burden of proof can move for acquittal at  
15 any point after the close of the prosecution's case in chief, provided that the motion is made  
16 before the case is submitted to the jury. Cal. Penal Code § 1118.1. "In ruling on a motion for  
17 judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an  
18 appellate court applies in reviewing the sufficiency of the evidence." People v. Cole, 33 Cal.4th  
19 1158, 1212-13 (2004). "The question 'is simply whether the prosecution has presented sufficient  
20 evidence to present the matter to the jury for its determination.'" People v. Stevens, 41 Cal.4th  
21 182, 200 (2007) (citations omitted). When reviewing the denial of a section 1118.1 motion, the  
22 reviewing court considers only the evidence in the record at the time the motion was made. Id.

23 Petitioner's Section 1118.1 claim is not cognizable in this proceeding. Petitioner's  
24 contention that, under California law, he should have been granted relief under Section 1118.1  
25 presents no federal habeas issue and implicates state law only. Estelle v. McGuire, 502 U.S. 62,  
26 67-68 (1991); Bonin v. Calderon, 77 F.3d 1155, 1161 (9th Cir. 1996). Even if this claim were  
27 cognizable, it would still fail. Petitioner has identified no clearly established federal right to an  
28 acquittal, let alone on the legal standard articulated in Section 1118.1. See Wright v. Van Patten,  
552 U.S. 120, 125-26 (2008); see also Moses v. Payne, 555 F.3d 742, 754 (2009) (where no

1 decision of the Supreme Court squarely addresses an issue, the state court’s adjudication cannot  
2 be contrary to, or an unreasonable application of, Supreme Court law). The only clearly  
3 established federal right identified by Petitioner in this claim is the right to a conviction based  
4 upon constitutionally sufficient evidence. Pet. at 10. The court will address the sufficiency of  
5 the evidence in the event that Petitioner intended to raise sufficiency of the evidence instead of  
6 the trial court’s error in denying his motion for acquittal under Section 1118.1.

7 “[T]he Due Process Clause protects the accused against conviction except upon proof  
8 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is  
9 charged.” In re Winship, 397 U.S. 358, 364 (1970). The Fourteenth Amendment’s Due Process  
10 Clause is violated, and an applicant is entitled to federal habeas corpus relief, “if it is found that  
11 upon the record evidence adduced at trial no rational trier of fact could have found guilt beyond  
12 a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 324 (1979). The Court must apply an  
13 additional layer of deference to the state appellate court opinion in applying the Jackson  
14 standard. Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). Federal habeas relief functions  
15 as a “guard against extreme malfunctions in the state criminal justice systems,” and not simply  
16 as a means of error correction. Harrington, 562 U.S. at 102-03 (quoting Jackson, 443 U.S. at  
17 332 n.5 (Stevens, J., concurring)).

18 Petitioner in essence challenges his conviction arguing the jury’s finding—that he did not  
19 act in self-defense—was not supported by the evidence in violation of his constitutional right to  
20 due process. Pet. at 10. Review of the record in this case confirms that the Court of Appeal’s  
21 decision was neither contrary to nor an unreasonable application of clearly established federal  
22 law.

23 To convict of assault with a deadly weapon, the prosecution must prove that Petitioner  
24 did not act in self-defense. CALCRIM No. 875. To determine whether Petitioner acted in self-  
25 defense the jury must determine “whether the circumstances would cause a reasonable person  
26 to believe the necessity of defense, whether the defendant actually acted out of defense of  
27 himself, and whether the force used was excessive.” People v. Clark, 130 Cal. App. 3d 371,  
28

1 378, *abrogated on other grounds by People v. Blakeley*, 23 Cal. 4th 82, 92 (2000). For self-  
2 defense to apply to an assault with a deadly weapon charge, the defendant must have shown  
3 that he was actually in fear of his life or serious bodily injury and that the other party's conduct  
4 was such as to produce that state of mind in a reasonable person. *People v. Sonier*, 113 Cal.  
5 App. 2d 277, 278 (1952).

6 Mr. Clements testified that at the time of the trial he had known Petitioner for about half  
7 a year and identified him as the defendant. Lodgment 1-7 at 687-88. Mr. Clements testified  
8 that he observed the fight between Petitioner and Mr. Morao on June 21, 2013. *See id.* at 687-  
9 805. He testified that he followed Petitioner and Mr. Morao at a distance as they walked down  
10 the street arguing. *Id.* at 689-92, 737-41. From a distance, Mr. Clements saw Petitioner strike  
11 Mr. Morao with something cylindrical with a sharp point. *Id.* at 696-98, 763-65, 797-98. Shortly  
12 after the fight, Mr. Clements noticed that Mr. Morao was bleeding. *Id.* at 708-09, 759-60. Mr.  
13 Clements testified that he thought "whatever was in [Petitioner's] hand did what happened to  
14 [Mr. Morao]." *Id.* at 797.

15 Mr. Morao also testified at the trial. *Id.* at 817-69; Lodgment 1-8 at 926-72. Mr. Morao  
16 testified that when he first spoke with Detective Tews the night of the incident, he said he was  
17 "jumped by – by two Hispanics." Lodgments 1-7 at 817; 1-8 at 927-28. Mr. Morao explained  
18 that he lied to Detective Tews initially because of his "felon mentality." Lodgment 1-7 at 819.  
19 However, when Detective Tews told Mr. Morao he had surveillance video of the incident, Mr.  
20 Morao told Detective Tews the truth. *Id.*

21 Mr. Morao testified that he and Petitioner fought on June 21, 2013 and that he was  
22 stabbed 14 times. *Id.* at 817-45, 850, 862. Specifically, he testified that he and Petitioner were  
23 arguing about money as they walked down the street and when Petitioner got close to Mr.  
24 Morao, the two began hitting each other. *Id.* at 839-40; Lodgment 1-8 at 937-42. Mr. Morao  
25 carried a pool cue with him because he knew Petitioner carried weapons and earlier in the day,  
26 Petitioner had shown him a serrated knife with a four or five inch blade. Lodgments 1-7 at 836-  
27 38; 1-8 at 930, 935. Mr. Morao testified that he tried to hit Petitioner with his pool cue, but  
28

1 Petitioner disarmed him. Lodgments 1-7 at 840; 1-7 at 948. Mr. Morao then began punching  
2 Petitioner in the face and head. Lodgments 1-7 at 840; 1-8 at 954 Mr. Morao testified that he  
3 wasn't paying much attention to what Petitioner was doing because "he's big" and Mr. Morao  
4 was just "doing [his] best to fight him." Lodgment 1-7 at 841. Mr. Morao testified that at the  
5 time of the fight he was 5'7" and weighed about 205 pounds and that Petitioner has an  
6 advantage over him because Petitioner is "way taller" and bigger than he is. Id. at 834-41;  
7 Lodgment 1-8 at 944-45. Mr. Morao testified that he felt "blows" to his chest and stomach, but  
8 didn't feel himself getting stabbed. Lodgment 1-7 at 841-42. After a while, Mr. Morao and  
9 Petitioner "just suddenly stopped" fighting because Mr. Morao felt like he "got enough hits in,  
10 and . . . just stopped." Id. at 842. Mr. Morao testified that after the fight he walked towards  
11 Mr. Clements and gave him celebratory high fives because Mr. Morao "felt like [he] got  
12 [Petitioner]." Id. at 843-44. At that point, Mr. Clements pointed out that Mr. Morao was  
13 bleeding. Id. at 844. Mr. Morao testified that his clothes were "drenched in blood." Id. at 845.

14 Petitioner testified on his own behalf. Lodgment 1-9 at 1145-93. He testified that Mr.  
15 Morao would call him every few weeks to help him obtain methamphetamine. Id. at 1145. On  
16 June 21, 2013, Petitioner and Mr. Morao got into an argument about the price of  
17 methamphetamine and Mr. Morao told Petitioner to "come around the front." Id. at 1149-50.  
18 Petitioner testified that he had a .25 caliber pistol and a "big ol' knife" on him at the time, but  
19 didn't want to use it because he thought this was a fist-to-fist fight. Id. at 1151, 1156-57, 1161-  
20 62. Petitioner testified that Mr. Morao wanted to fight and Petitioner thought "I ain't got no  
21 problem. I'm fixing to whip this little chump's ass, you know, for crossing me up, plain and  
22 simple." Id. at 1152. He testified that he did not stab Mr. Morao and only used his hands. Id.  
23 at 1153. Petitioner testified that he wasn't worried about fighting Mr. Morao, who is twenty  
24 years younger, because "[m]ost youngsters these days they don't even know how to sling the  
25 fist. They can't even fight." Id. at 1154. Petitioner testified that he suffered an injury to the  
26 nose as a result of Mr. Morao punching him in the face. Id. at 1169. He explained that once  
27 he took the pool cue away from Mr. Morao, Mr. Morao ran away and that was the end of the  
28

1 fight. Id. at 1154-55. Petitioner testified that he went to the police station after the fight  
2 because Mr. Morao attacked him and Petitioner was just defending himself. Id. at 1157. On  
3 cross-examination, Petitioner testified that a Hispanic male stabbed Mr. Morao after he ran away  
4 from Petitioner. Id. at 1158. Later, Petitioner testified that he never actually went to the police  
5 department to report what happened on June 21, 2013. Id. at 1165.

6 During the section 1118.1 hearing, Petitioner argued that the evidence was insufficient  
7 to prove he had not acted in self-defense. Lodgment 1-8 at 1015. He explained:

8 There's no evidence – there has been no testimony to prove that the  
9 defendant has actually had a knife in his hand.

10 There was testimony, however, that the defendant took from the alleged  
11 victim with both hands his club or his pool stick, weapon of choice. There's  
12 conflicting testimony as to what he did with that. However, the witness – based  
13 upon the presentation of the preliminary transcript to refresh the individual's  
14 memory, at first stated that he swung and he hit the defendant 20 times, you  
15 know. And then on that he swung the stick first, and it didn't work. The defendant  
16 took it away from him. But he just kept swinging.

17 However, we brought it out that – on cross-examination when he swung  
18 the stick, it was taken from him, and he ran into the streets.

19 Okay. Now, the video that was shown does not show the defendant do  
20 anything to [Mr. Morao]. [Mr. Morao] – all it shows is some feet work, and then  
21 it shows [Mr. Morao] running into the street. It doesn't show the defendant  
22 chasing him.

23 In fact, I obtained testimony from the alleged victim that he was getting  
24 loud in front of the Peachtree. And he told the defendant, let's take it down the  
25 street.

26 And he had concealed on his person a club which he intended to use on the  
27 defendant. The defendant had no knowledge of this, and he didn't tell the  
28 defendant that he was going to do this.

1  
2 But when he did do it, the defendant had an absolute right to defend  
3 himself. However, the defense is not saying that they used a knife on the alleged  
4 victim. The defense position is plain and simple. That he took the stick away from  
5 him, and he ran away and he run off in the street.

6 Based upon the – the – what he tried to do earlier resulting from the  
7 argument that was up in the room, somebody else did it to him that there – they  
8 – both [Mr. Clements] and [Mr. Morao] is more afraid of, but they feel like it would  
9 be easier for them to put it off on me because other people will take a machete  
10 and chop their head off.

11 Id. at 1015-16. The prosecution countered, arguing as follows:

12 Well, let me first address the apparent defense theory that Mr. Morao was  
13 not stabbed at the – outside the residence of 1011 F Street. He most certainly  
14 was. He testified that he was stabbed right where the video shows the feet of the  
15 defendant and Mr. Morao. And blood was located at the scene. So that is sufficient  
16 proof that the victim, Mr. Morao, was stabbed right there.

17 The fact that nobody sees a knife in the defendant's hand is of no moment  
18 because Mr. Morao has an obvious stab wound.

19 As to the defense theory that Mr. Morao was stabbed somewhere else by  
20 someone else, that is contradicted by the physical evidence of the blood trail  
21 leading from 1011 F Street back to the entrance to the Peactree Inn.

22 The theory that Mr. Morao was stabbed somewhere after he went to that  
23 location is contradicted by very credible testimony of Mr. San Coucie, who saw Mr.  
24 Morao enter the lobby, request paramedics while he was bleeding in the lobby.  
25 And Mr. San Coucie called paramedics, observed Mr. Morao exit the Peactree Inn  
26 back out to the sidewalk where paramedics arrived and treated him.

27 With regard to an allegation of self-defense, certainly that doesn't apply  
28 where a person denies that they stabbed the person. The defendant admits that  
he was there and that he disarmed Mr. Morao of the pool cue.

1 Mr. Morao testifies consistently with that. That the defendant disarmed him  
2 of the pool cue. At that point, the defendant was the only one who was armed.  
3 Mr. Morao, who is a smaller individual, indicates that he punched the defendant.  
4 But it's the People's position that he was doing that in self-defense.

5 Further, any force that Mr. Morao used at that point did not justify the  
6 deadly force that the defendant used when he stabbed him in the gut.

7 So at this point the state of the evidence is such that a reasonable jury  
8 would find the defendant guilty and reject what the defendant has claimed is the  
9 state of the evidence.

10 Id. at 1017-18. After hearing the parties' arguments, the trial court concluded as follows:

11 In this case clearly there are issues as to who actually initiated the physical  
12 part of the altercation. There are issues as to why it all happened. And then there  
13 are issues related to what weapon, if any, the defendant had at the time. They  
14 would be two individuals who were in the altercation were fighting.

15 However, there is sufficient circumstantial evidence that the People's case  
16 can be proved beyond a reasonable doubt if the jury finds that it has been proved  
17 beyond a reasonable doubt through either direct or circumstantial evidence. Direct  
18 being the testimony of Mr. Morao. Circumstantial by being the length of time  
19 between the first part of the altercation and the stabbing, which by all accounts  
20 seems to have taken only minutes.

21 So at this point, the Court cannot say that insufficient evidence has been  
22 presented in this case. There's absolutely if the jury believes the facts elicited so  
23 far to find you guilty based on circumstantial evidence.

24 Id. at 1019.

25 Here, the jury ultimately agreed with the trial court. A jury found Petitioner guilty of  
26 assault with a deadly weapon. Lodgment 3 at 211. The jury determined that Mr. Clements' and  
27 Mr. Morao's testimony were more credible than Petitioner's testimony. It is the jury's  
28 responsibility "to decide what conclusions should be drawn from evidence admitted at trial" and

1 a reviewing court can overrule a jury verdict on the ground of insufficient evidence only if no  
2 rational trier of fact could have agreed with the jury. Cavazos v. Smith, 565 U.S. 1, 2 (2011)  
3 (per curiam). “The reviewing court must respect the exclusive province of the fact finder to  
4 determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable  
5 inferences from proven facts” by assuming that the jury resolved all conflicts in support of the  
6 verdict. United States v. Hubbard, 96 F.3d 1223, 1226 (9th Cir. 1996); Walters v. Maass, 45  
7 F.3d 1355, 1358 (9th Cir. 1995). A rational jury could have reasonably concluded that Petitioner  
8 was not in fear of his life or serious bodily injury because Petitioner testified that he was not  
9 worried about fighting Mr. Morao and because Petitioner had a pistol and knife in his possession  
10 during the fight. See Lodgment 1-9 at 1145-93. A rational jury also could have concluded that  
11 Petitioner used excessive force on Mr. Morao because Mr. Morao had been disarmed and  
12 sustained serious injuries. By finding Petitioner guilty of assault with a deadly weapon, the jury  
13 necessarily found that the prosecution met its burden. Put otherwise, by so doing, the jury  
14 necessarily found that Petitioner did not act in self-defense. Vinh Quoc Ta v. Pliler, 2008 U.S.  
15 Dist. LEXIS 123251, at \*99-100 (C.D. Cal. Dec. 30, 2008) (finding sufficient evidence that the  
16 petitioner did not act in self-defense based on the jury’s determination that the petitioner was  
17 guilty of the crime committed). As summarized above, there is overwhelming evidence  
18 supporting the jury’s verdict. Accordingly, the Court **RECOMMENDS** that Petitioner’s fifth  
19 ground for relief be **DENIED**.

#### 20 **PETITIONER’S REQUEST FOR AN EVIDENTIARY HEARING**

21 In his Traverse and Supplemental Traverse, Petitioner requests that the Court hold an  
22 evidentiary hearing on his claims. Traverse at 2; Supp. Traverse at 39. Rule 8(a) of the Rules  
23 Governing Section 2254 Cases provides that where a petition is not dismissed at a previous  
24 stage in the proceeding, the judge, after the answer, transcripts, and record of the state court  
25 proceedings are filed, shall, upon review of those proceedings, determine whether an evidentiary  
26 hearing is required. The purpose of an evidentiary hearing is to resolve the merits of a factual  
27 dispute.

1 Under 28 U.S.C. § 2254(e)(2), as amended by AEDPA, a district court presented with a  
2 request for an evidentiary hearing must first determine whether a factual basis supporting the  
3 petitioner's claims was developed in state court. McQuiggin v. Perkins, 133 S.Ct. 1924, 1934  
4 (2013); see also Williams, 529 U.S. at 431; Baja v. Ducharme, 187 F.3d 1075, 1078-79 (9th Cir.  
5 1999). If a factual basis was developed in the state court, Petitioner is entitled to a hearing if  
6 he establishes he "did not receive a full and fair opportunity to develop [the facts of his claim]  
7 in state court" and if "he has alleged facts that, if proven, would entitle him to habeas relief."  
8 Williams v. Woodford, 384 F.3d 567, 586 (9th Cir. 2004); see also Insyxiengmay v. Morgan, 403  
9 F.3d 657, 670 (9th Cir. 2005) ("petitioner's allegations need only amount to a colorable claim");  
10 Phillips v. Woodford, 267 F.3d 966, 973 (9th Cir. 2001) ("Where a petitioner raises a colorable  
11 claim [to relief], and where there has not been a state or federal hearing on this claim, we must  
12 remand to the district court for an evidentiary hearing") (internal citations omitted); Cullen v.  
13 Pinholster, 131 S.Ct. 1388, 1398 (2011).

14 If a factual basis for a particular claim was not developed in the state court, the district  
15 court must determine whether the failure to develop the factual basis of the claim in state court  
16 was attributable to the petitioner. See Williams, 529 U.S. at 432 (explaining that "a failure to  
17 develop the factual basis of a claim is not established unless there is a lack of due diligence, or  
18 some greater fault, attributable to the prisoner or the prisoner's counsel"); see also Cooper-  
19 Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir. 2005). If the failure was attributable to the  
20 petitioner, the court must deny the request for an evidentiary hearing unless the petitioner  
21 establishes one of two narrow exceptions set forth in 28 U.S.C. § 2254(e)(2), which provides:

22 (d) If the applicant has failed to develop the factual basis of a claim in State court  
23 proceedings, the court shall not hold an evidentiary hearing on the claim unless  
24 the applicant shows that –

25 (A) the claim relies on –

26 (i) a new rule of constitutional law, made retroactive to cases on collateral  
27

1 review by the Supreme Court, that was previously unavailable; or

2 (ii) a factual predicate that could not have been previously discovered  
3 through the exercise of due diligence; and

4 (B) the facts underlying the claim would be sufficient to establish by clear and  
5 convincing evidence that but for constitutional error, no reasonable factfinder  
6 would have found the applicant guilty of the underlying offense.

7  
8 28 U.S.C. § 2254(e)(2).

9 Here, the Court finds that a factual basis for Petitioner's claims was developed in state  
10 court. This conclusion is supported by the record, which shows that each of Petitioner's  
11 cognizable claims was brought to the attention of and adequately developed in the trial court.  
12 For example, Petitioner's alleged Brady violation was discussed in detail before and during trial.  
13 See Lodgments 1-3 at 251-75; 1-4 at 408-09; 1-5 at 471-74; 1-7 at 718-71; 1-8 at 900-21, 923-  
14 24, 973-94, 1008; 1-9 at 1130-32, 1195-97. Petitioner's alleged Faretta violations were also  
15 adequately developed, partially due to Petitioner's diligence in providing "notice" to the trial  
16 court. See Lodgments 1-1 at 2-26; 1-3 at 251-74; see also ECF No. 17 at 51-52. Finally, facts  
17 were fully developed at trial to determine whether there was sufficient evidence to find that  
18 Petitioner did not act in self-defense. See Lodgments 1-6; 1-7; 1-8; 1-9. Thus, Petitioner  
19 received a full and fair opportunity to develop the facts of his claims in state court.

20 Moreover, Petitioner did not allege facts that, if proven, would entitle him to habeas relief.  
21 The facts necessary to evaluate Petitioner's claims exist in the present record and it is unlikely  
22 that an evidentiary hearing would yield any further information. Upon careful consideration, the  
23 Court has recommended that Petitioner's habeas petition be dismissed because it does not allege  
24 facts sufficient to entitle him to relief under 28 U.S.C. § 2254(d) on any of his claims.  
25 Accordingly, Petitioner's motion for an evidentiary hearing is **DENIED** because federal habeas  
26 relief is not warranted under § 2254(d) and Petitioner has not demonstrated he meets the  
27 conditions for obtaining an evidentiary hearing under § 2254(e)(2).



1 approving and adopting this Report and Recommendation **DENYING** the Petition for Writ of  
2 Habeas Corpus.

3 **IT IS ORDERED** that no later than, **September 27, 2017**, any party to this action may  
4 file written objections with the Court and serve a copy on all parties. The document should be  
5 captioned "Objections to Report and Recommendation."

6 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the Court  
7 and served on all parties no later than, **October 18, 2017**. The parties are advised that failure  
8 to file objections within the specified time may waive the right to raise those objections on  
9 appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

10 **IT IS SO ORDERED.**

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12 Dated: 8/29/2017

  
13 Hon. Barbara L. Major  
14 United States Magistrate Judge  
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